88-567

No. ___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

FRANK D. MONACO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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4 pp

QUESTIONS PRESENTED

1. Is a criminal defendant who challenges information relied upon in sentencing as materially false and who is refused court process needed to establish falsity denied due process of law?

2. When a federal criminal defendant is refused court process to support a challenge to information relied upon in sentencing, does the Court of Appeals review only the challenge actually made for abuse of discretion under the Federal Rules of Criminal Procedure or does it review the sentencing procedure as a whole for compliance with due process?

LIST OF PARTIES/RELATED ENTITIES

All parties to the proceeding in the Court of Appeals are listed in the caption except for Defendant Daniel Monaco, Jr. who has not sought review of his sentence in this Court. The provision of Supreme Court Rule 28.1 concerning corporations does not apply to this petition.

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FRANK D. MONACO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Frank D. Monaco asks this Court to review by writ of certiorari the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on July 26, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was certified for publication although it has not yet appeared in the official reports. *United States v. Monaco*, No. 87-1011, slip op. 9065 (9th Cir. Jul. 26, 1988). A copy is attached as an appendix to this petition. A petition for rehearing and rehearing en banc were denied on September 22, 1988. Judge Aldisert of the United States Court of Appeals for the Third Circuit,

sitting by designation, would have recommended rehearing en banc. The unpublished order denying rehearing and rehearing en banc is included in the appendix.

JURISDICTION

This Court has jurisdiction to entertain this petition for a writ of certiorari from a final judgment of a Circuit Court of Appeals. 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves the application of the Fifth Amendment and the Federal Rules of Criminal Procedure to a criminal defendant's request for court process needed to meaningfully challenge the accuracy of information relied upon in sentencing.

The Fifth Amendment provides in relevent part: "No person shall be . . . deprived of . . . liberty . . . without due process of law."

Federal Rule of Criminal Procedure 32(c)(3)(A)(amended)[1] provided in relevant part:

> At a reasonable time before imposing sentence the court shall permit the defendant and the defendant's counsel to read the report of the presentence investigation. . . .The court shall afford the defendant

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[1] After Petitioner was sentenced on January 6, 1987, the Federal Rules of Criminal Procedure were amended. The amendments, which apply to offenses committed after November 1, 1987, Pub.L. 98-473, Title II, §215(a), made no substantive change in Rule 32(c)(3)(A). Notes Of Advisory Committee on Rules, 18 U.S.C. foll. Fed.R.Crim.P. 32 (West Supp. 1988). The language at issue in this proceeding is unchanged by the amendments which, accordingly, do not affect the issues presented by this Petition.

and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

STATEMENT OF THE CASE

A. Summary Of Material Facts

Frank Monaco (Monaco) founded Golden Plan of California, Inc. (Golden Plan) in 1974. Golden Plan acted as a broker of loans secured by second and third deeds of trust on real property. Golden Plan investors received whole or partial assignments of deeds of trust held by Golden Plan. At its peak, Golden Plan had one hundred and thirty employees in twenty-five offices scattered over California.

On September 1, 1981, Monaco sold Golden Plan to his brother, Daniel Monaco, Jr. Golden Plan remained open until January 28, 1982, when it closed its doors because of alleged insolvency. An involuntary petition under Chapter 11 of the Bankruptcy Code was filed against Golden Plan in February of 1982. *See In re Golden Plan of California, Inc.*, 829 F.2d 705, 707 (9th Cir. 1987). The bankruptcy court installed a trustee to oversee Golden Plan's affairs.

B. Summary of Procedural History

On May 29, 1985, a federal grand jury indicted Monaco on one count of conspiracy to commit mail fraud and fifty-one separate counts of mail fraud. The indictment marked the culmination of a four year investigation by California and federal law enforcement and taxing authorities. The indictment charged Monaco misled

investors by appraising property securing their loans at inflated values. According to the indictment, the Golden Plan bankruptcy caused large losses for these under-secured investors.

On July 18, 1986, Monaco pleaded guilty to the conspiracy charge and one count of tax evasion.[2] The District Court ordered the United States Probation Service to prepare a presentencing report (the report). Fed.R.Crim.P. 32(c)(1). At the hearing on the guilty plea, both the United States (the Government) and Monaco indicated an evidentiary hearing or some form of discovery might be necessary when the report was eventually prepared. The District Judge then set a briefing schedule for objections to the report and a Government response to the objections.

The report, issued in mid-October, alleged in general terms that $3 million was discovered missing from the Golden Plan trust account at the time it was sold to Daniel Monaco and estimated total losses to Golden Plan investors at $20 million. Fed.R.Crim.P. 32(c)(2)(C). The report did not explain these estimates beyond attributing them to the Golden Plan trustee (the trustee). Monaco objected to the estimates as materially false: There was no loss resulting from criminal conduct and certainly no loss which could be ascribed to him. Fed.R.Crim.P. 32(c)(3)(A).

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[2] In entering his plea, Monaco admitted one overt act in furtherance of the conspiracy which involved a loss of no more than approximately $25,000.00.

Since the report did not identify the trustee's method of calculating losses or the source of his information, Monaco requested an opportunity to either depose the trustee or cross-examine him at an evidentiary hearing to develop the information needed to establish his estimates were false.[3]

The determination of "loss" in this case is no simple matter. "Loss" is said to have resulted when investors loaned money to homeowners based on inflated appraisals furnished by Golden Plan. Monaco has contended from the beginning that any loss was the result of a depressed market in real estate during the period in question. He presented considerable factual support for this argument. He could not present factual opposition to the other variables. For example, did the trustee base his estimate on "historical appraisals," *i.e.*, an appraisal of the property's value at the time the investor loan was made? On the other hand, did the trustee calculate loss using the amount realized when properties were sold out of the bankruptcy estate at distress prices? Monaco also introduced a substantial amount of evidence that other officers of mortgage brokerage firms convicted of similar offenses had received much less than the maximum available sentence. Numerous brokerage firms had collapsed in California at about the same time as Golden Plan;

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[3] Counsel for Monaco attempted several times to contact the trustee informally for an explanation of his estimates of loss and received no response.

Monaco also asked to depose or examine the former accountant for Golden Plan, his former tax preparer, concerning his tax return to show the Government lost no tax revenue.

judges in those cases had penetrated the huge losses alleged in sentencing reports and imposed sentences based on loss directly caused by criminal conduct rather than economic forces. Monaco also noted all claimed "loss" occurred *after* he sold Golden Plan and the trustee did not explain how his conduct caused any "loss." Monaco raised these and other questions regarding the trustee's estimates in his opposition to the report.

Following local practice[4] and the briefing schedule established by the District Court, Monaco made the request to examine the trustee in both his motion to correct the report and his sentencing memorandum. The District Court did not act on the request until the day of sentencing. After concluding the report, including the estimate of loss, was accurate in its entirety, the District Court summarily denied the request to either depose or cross-examine the trustee.[5] The District Court's resolution

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[4] If the defendant or his counsel allege any factual inaccuracy in the presentence report, a written motion for correction of the report shall be served on the probation officer and the attorney for the government not later than five days prior to the date set for judgment and sentencing. The motion shall identify the specific statements alleged to be factually inaccurate; it shall set forth the specific remedy sought; and, it shall state the relevance of the matters to the sentencing or correctional treatment of the defendant. E.D.R. 461.

[5] Rule 32 requires the report to contain "information concerning any harm, including financial . . . suffered by any victim of the offense," Fed.R.Crim.P. 32(c)(2)(C). The Parole Commission *must* consider "[a] statement by any victim of the offense *for which the prisoner is imprisoned* about the financial . . . loss suffered by such victim." 28 C.F.R.

(Continued on following page)

of Monaco's challenges to the report was attached to the judgment, Fed.R.Crim.P. 32(c)(3)(D), for the consideration of United States Parole Commission in setting a parole date. 28 C.F.R. §§2.19(a)(3)(1986) & 2.20(1986). The District Court sentenced Monaco to the maximum penalty on each count, the sentences to be served consecutively, for a ten year term. Had Monaco successfully gathered the testimony he proposed to offer at sentencing, the offenses would not have merited the maximum sentences imposed.

On appeal, the Ninth Circuit Court of Appeals held the District Court's denial of an evidentiary hearing would be reviewed for abuse of discretion under Federal Rule of Criminal Procedure 32(c)(3)(A). *United States v. Monaco (Monaco)*, slip op. at 9076. The Court of Appeals addressed the request for a deposition and the request for an evidentiary hearing separately. It found Monaco had "waived" any right to depose the trustee "by fail[ing] to

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§2.19(a)(6)(1986)(emphasis added). The District Court's approach to sentencing is illustrated by its treatment of "victim impact letters" in this case.

The letters were solicited in conjunction with the sentencing of another defendant, Samuel Monaco, but were nonetheless included in the report for Monaco. The Probation Officer would not allow Monaco to see these letters despite repeated requests. Since they were part of the report, Monaco had a right to see and challenge them "[a]t a reasonable time before [sentence was] impos[ed]." Fed.R.Crim.P. 32(c)(3)(A). On the day of sentencing, the District Court granted Monaco a twenty minute recess to read 45 letters, many of them handwritten. It then summarily overruled all objections to the letters.

ask the court for an order requiring the trustee to respond to his questions." *Monaco,* slip op. at 9077.

The Court of Appeals then examined Monaco's request for an evidentiary hearing. It found Monaco had extensive access to the Government's evidence through discovery. The panel then noted: "Finally, the record shows that *Frank Monaco owned the Golden Plan.* If the Government's financial information was inaccurate, he had the opportunity to present correct facts to the court from the company's records." *Monaco,* slip op. at 9077 (emphasis added).

The Court of Appeals then determined Monaco had failed to present facts to rebut the Government's evidence and the District Court did not abuse its discretion in not providing an evidentiary hearing to examine the trustee. *Id.* at 9078. This conclusion was based upon the faulty premise that Monaco had a meaningful opportunity *to obtain* the facts necessary to rebut the Government's evidence.

REASONS FOR GRANTING REVIEW

THIS COURT HAS NOT EXAMINED THE PROCESS DUE A CRIMINAL DEFENDANT WHO CHALLENGES INFORMATION RELIED UPON IN SENTENCING AS MATERIALLY FALSE

Due process forbids the consideration of false information in the sentencing process. *See Townsend v. Burke,* 334 U.S. 736, 741 (1948). A defendant has the right to be sentenced based on accurate information and must be given the opportunity to rebut any materially false

assumptions relied upon by the trial court. *See Gardner v. Florida*, 430 U.S. 349, 356 (1977). This petition presents the next question in this sequence: When the defendant challenges information as false and requires the aid of court process to rebut it, does the refusal to grant him the aid of court process violate due process of law?

Clearly the first step in avoiding the use of false or unreliable information is to allow the defendant to object to such information. This fundamental rule of due process noted in *Gardner* is reflected in the Federal Rules of Criminal Procedure:

> At a reasonable time before imposing sentence the court shall permit the defendant and the defendant's counsel to read the report of the presentence investigation. . . .The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, *in the discretion of the court*, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it. Fed.R.Crim.P. 32(c)(3)(A)(emphasis added).

If the court decides not to consider the challenged information in sentencing, it can note this fact on the record and the matter ends there. Fed.R.Crim.P. 32(c)(3)(D). If the information is to be used in sentencing, the court must first determine it is accurate. The Federal Rules of Criminal Procedure require the District Court to resolve any challenges to information relied on in sentencing on the record. Fed.R.Crim.P. 32(c)(3)(D).

Before the court makes findings on the challenges, however, it must determine if the defendant has been given an adequate opportunity to present his challenge to the information. If not, upon a proper request and showing of need, the defendant should receive an evidentiary

hearing where he can cross-examine the Government's witnesses or possibly an opportunity to depose those witnesses.[6]

When the facts relied upon in sentencing are simple, a straightforward objection might well provide the court with the information needed to determine if the facts are accurate. For example, a defendant challenging the validity of a prior conviction can present simple documentary evidence supporting his claim.

When the facts are more complex, the defendant's objections will necessarily be more detailed and require greater development of the facts. This is particularly true in "white collar" criminal cases where both the crime and any resulting harm may arise in the context of complicated business transactions. At sentencing, the United States Attorney himself characterized this case as the most complicated in the history of the Eastern District of California. Where, as here, the defendant can object but cannot object in detail because the source of information needed is beyond his reach, the court should either refuse to consider the information or give the defendant access to the court process needed to adequately present his challenge.

In the present case, Monaco filed a timely challenge to the trustee's estimate of loss as well as its allocation to

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[6] Federal Rule of Criminal Procedure 15, which allows depositions of witnesses for "use at trial," would presumably apply to the deposition of a witness whose testimony is used in sentencing.

him. He explained that he could not refute these estimates without the aid of court process. In order to challenge an estimate, Monaco would need to know, at the very least, the facts relied upon to make the estimate and method used to calculate it. Instead of determining in advance what information would be considered and then deciding if Monaco needed the aid of court process to adequately challenge that information, the District Court indicated for the first time at sentencing that it considered the report accurate in its entirety. The District Judge did not know how the trustee arrived at his loss estimates and simply accepted them in their unsupported form.

The District Judge then found Monaco would not be allowed to depose or cross-examine the trustee *for he had failed to present a sufficient challenge to the trustee's estimates*. If the defendant's request for court process to adequately challenge information has merit, the defendant, by definition, will be unable to present a challenge sufficient to rebut the information without the court's help. The court should instead determine *what the defendant needs* to adequately challenge the information and then determine if due process requires that he get it. Review of the challenge *actually made* is meaningless; any meaningful review will examine the sentencing process as a whole.

Although this Court has not directly addressed the question presented, it indicated in a footnote in *Gardner* that procedures used in sentencing were subject to due process review. 430 U.S. at 358 n.9 *quoting Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The process due in a particular case requires a balancing of (1) the nature of the individual interest, (2) the risk of error associated

with the present procedures, (3) the value of additional procedural safeguards, and (4) the government's interest in avoiding undue fiscal or administrative burdens. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

(1) Clearly Monaco has a significant liberty interest in the sentence to be imposed as well as the factual findings made at sentencing. The report and the District Court's finding of reliability *must* be considered by the United States Parole Commission in determining his eligibility for parole. 28 C.F.R. §2.19(a)(3)(1986). Commission guidelines increase the time served before parole eligibility as the dollar amount involved in the crime increases, 28 C.F.R. §2.20, Chap. 3, 331(a)(1986), and the Commission reserves the right to increase the severity of the offense in extraordinary circumstances. 28 C.F.R. §2.20(d)(1986).

(2) The circumstances surrounding the claims of loss in this case were exceedingly complex. Whenever the court faced with such a case relies upon an estimate or approximation in sentencing, it is relying heavily on the accuracy of its source; in some of his allocations, time has proved the trustee wrong. The trustee's belief that certain property belonged to Golden Plan rather than a group of Golden Plan investors (the "Bear investors") was incorrect. *See In re Golden Plan, Inc., supra*, 829 F.2d at 708-711. Presumably the Bear investors could sell this property to reduce or eliminate any "loss" they suffered. Since the trustee's estimate in the report was based on facts and calculations which were not revealed to either the court or the defendant, neither Monaco nor the District Court knew at the time of sentencing or know now if the Bear investor's "loss" was included. If the defendant cannot

examine the assumptions underlying an estimate, neither the court nor the defendant can be assured it is accurate. The trustee's estimates of loss ran a significant risk of error absent a broader opportunity to challenge them.

(3) Additional procedural safeguards were the only possible means of challenging the trustee's estimates. As noted above, the District Court never challenged or questioned them. Allowing Monaco to examine the trustee in a deposition or evidentiary hearing would allow both Monaco and the District Court to evaluate the reliability of his testimony. Whether the trustee's estimates were accurate or not, a clear explanation of their basis would benefit the defendant, the Government and the District Court, in short, insure the integrity of the sentencing process.

(4) Finally, both the Government and the District Court were told at the time Monaco entered his plea that a hearing might be necessary to resolve challenges to the report. Neither the Court nor the Government objected to this procedure as burdensome. If the District Court does not have courtroom time available for an evidentiary hearing, a deposition is a ready alternative which eliminates the requirement for direct participation by the judge. Fed.R.Crim.P. 15.

This Court should grant the requested writ to establish due process standards for challenges to information to be relied upon in sentencing. The Ninth Circuit's decision to apply an abuse of discretion standard rather than this due process analysis conflicts with the approach taken by the Second Circuit.

THE STANDARD OF REVIEW APPLIED TO A DENIAL OF COURT PROCESS IN CHALLENGING INFORMATION RELIED UPON IN SENTENCING HAS DIVIDED THE CIRCUITS; THIS COURT SHOULD APPROVE THE DUE PROCESS ANALYSIS EMPLOYED BY THE SECOND CIRCUIT RATHER THAN THE ABUSE OF DISCRETION STANDARD APPLIED BY THE NINTH CIRCUIT

The Ninth Circuit held that a refusal to make court process available to a defendant challenging information relied upon in sentencing was to be reviewed for abuse of discretion. *United States v. Monaco, supra,* slip op. at 9076. The panel viewed the issue presented as a case of first impression. Id. at 9074-76 *citing United States v. Petitto,* 767 F.2d 607, 611 (9th Cir. 1985)(*dictum*); *United States v. Peterman,* 841 F.2d 1474, 1484 (10th Cir. 1988)(*dictum*). The Second Circuit, however, has reviewed the denial of an evidentiary hearing to a defendant challenging information relied on in sentencing under the four-part *Mathews* test. *See United States v. Romano,* 825 F.2d 725, 729 (2d Cir. 1987).

The Ninth Circuit's abuse of discretion test is not the equivalent of due process analysis. The refusal to grant a hearing under Rule 32(c)(3)(A) might not be an abuse of discretion but the sentencing proceeding, as a whole, might nevertheless violate due process. The principal difference between the two is the focus of the test.

The Ninth Circuit did not examine the type of information relied upon, the possibility it was erroneous, the burden of the requested court process or the contribution cross-examination might make to the integrity of the

sentencing procedure. *Cf. United States v. Romano*, 825 F.2d 729-30 (evaluating these factors). The Court of Appeals looked instead only at the facts Monaco actually presented in opposition to the trustee's estimates. *Monaco*, slip op. at 9078. Monaco had admitted he did not have access to the facts necessary to rebut the trustee's estimates and that is precisely why he asked the District Court for an opportunity to obtain them. Since the District Court denied him that opportunity, it is not surprising the Ninth Circuit found the factual challenge actually made inadequate. Even analyzed strictly in terms of Rule 32, however, Monaco did present *facts* in opposition to the report which made a refusal to grant an evidentiary hearing or a deposition an abuse of discretion. These facts included an explanation of the decline in the real estate market, questions concerning the appraisals or other figures relied on by the trustee and an objection to the allocations of loss. If nothing else, Monaco presented factual objections sufficient to require the Government to further buttress its report if not sufficient to justify court process to aid his rebuttal. Neither, of course, was forthcoming.

Whether or not the District Court, which waited until the day of sentencing to even consider the question, abused its discretion based on the facts Monaco actually mustered is, of course, beside the point.[7] The question is

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[7] For example, the Second Circuit has applied the *Mathews* test to a refusal to grant an evidentiary hearing while enigmatically noting "Sentencing hearings ultimately are conducted within the discretion of the District Court." *United States v. Pugliese*, 805 F.2d 1117, 1122-23 (2d Cir. 1986). The

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Did Monaco have an adequate opportunity to *develop* facts which would have rebutted estimates contained in the report? As the extended analysis in the previous section demonstrates, he did not. He was not given any meaningful opportunity to develop opposing facts given the nature of the facts he was required to oppose. The value of an estimate is, by definition, dependent upon the accuracy of the facts underlying it and the acceptability of the formula used to construct it. Those facts and formula had only one source, the trustee, and that source was unavailable to Monaco. Certainly the District Court sought no explanation for the trustee's estimates; it simply accepted them wholesale. The trustee has been proved demonstrably wrong in at least part of his estimate. Under all the circumstances, Monaco did not have a fair opportunity to oppose the report's estimate of loss.

This Court should take this opportunity to resolve the split between the Circuits. As foreshadowed in *Gardner*, the test to be applied to challenges to the fairness of sentencing procedures is the four-part due process test of *Mathews v. Eldridge*, 424 U.S. at 335, rather than the abuse of discretion test applied by the Ninth Circuit.

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Court found the defendant "had no right to a *mandatory* evidentiary sentencing hearing," *id.* at 1123 (emphasis added), but nonetheless found the district judge's reliance on substantially inaccurate information violated due process. *Id.* at 1123-24. *See also United States v. Stevens*, 851 F.2d 140, 144 n.8 (6th Cir. 1988)(identifying standard as due process; applying abuse of discretion review).

CONCLUSION

Petitioner has been denied due process of law in that he was not given a fair opportunity to rebut information relied upon in sentencing him to prison and determining his eligibility for parole. The District Court refused his request for court process needed to examine the witness relied on to accuse him of causing monetary loss. The Ninth Circuit Court of Appeals reviewed this denial of court process for abuse of discretion under Federal Rule of Criminal Procedure 32(c)(3)(A). This standard of review conflicts with the proper standard of review, a four-part due process analysis, employed by the Second Circuit Court of Appeals.

Petitioner respectfully asks this Court to issue a writ of certiorari to remedy this violation of due process and resolve the conflict between the decisions of the Second and Ninth Circuits.

DATED: September 28, 1988

Respectfully submitted,

SEGAL & KIRBY

BY MALCOLM S. SEGAL
JAMES R. KIRBY II
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States of America, *Plaintiff-Appellee,* v. Frank D. Monaco, *Defendant-Appellant.*	)	No. 87-1011 D.C. No. CR. S-85-82EJG
United States of America, *Plaintiff-Appellee,* v. Daniel Monaco, Jr., *Defendant-Appellant.*	)	No. 87-1013 D.C. No. CR. S-85-82EJG OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted
June 13, 1988–San Francisco, California

Filed July 26, 1988
Before: Ruggero J. Aldisert,* Arthur L. Alarcon and Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Alarcon

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*Honorable Ruggero J. Aldisert, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

SUMMARY

Criminal Sentencing

The court affirmed a judgment and held that a district court has the discretion to grant or deny an evidentiary hearing when a defendant challenges the presentence report's accuracy.

Appellant Frank Monaco founded Golden Plan of California, Inc. He subsequently sold it to his brother, Daniel. An involuntary bankruptcy petition was filed shortly thereafter. A federal grand jury returned an indictment against six Monacos and Donald Sapronetti alleging a conspiracy to defraud investors. All pleaded guilty to some of the charges. Frank and Daniel filed objections to their presentence reports. Both asked the court to hold an evidentiary hearing regarding their objections. The district court held that the presentence report did not contain any factual inaccurancies and sentenced Daniel. Frank's objections to his presentence reported was overruled and his request for an evidentiary hearing was denied. No factual inaccuracies in the report were found and Frank was sentenced.

[1] The trial judge did not abuse his discretion in refusing to recuse himself in sentencing Frank. [2] Knowledge obtained from judicial proceedings involving a codefendant does not require recusal. [3] Federal Rules of Criminal Procedure rule 32(c)(3)(A) provides that the decision whether testimony may be introduced to rebut any factual allegation is in the discretion of the court. [4] In light of the evidence, the district court did not abuse its discretion in concluding that an evidentiary

hearing or an order compelling the taking of a deposition of the trustee was not required. [5] Because Frank pled guilty to the conspiracy count, the fact that he or his criminal activities is not described in the victim impact letters does not bar their consideration. [6] Nor did Frank explain the reason an accountant was not available for questioning about any tax liability prior to the sentencing hearing. [7] Frank contends that the district court failed to individualize his sentence. [8] This claim is refuted by examining the sentence received by each defendant. [9] Daniel has multiple sclerosis. He argues that because no specific details concerning his condition or needed treatment were given the prison official, the court had a clear duty to at least allow a hearing to determine his present condition, needed treatment and availability of prison facilities, to treat him. [10] The court had before it the statements of the probation officer and the government attorney that they had been informed that the Bureau of Prisons had facilities to provide adequate medical care for a prisoner with multiple sclerosis. [11] Daniel failed to present any evidence during the sentencing hearing to support his assertion that the type of treatment he sought was not available in the prison system.

COUNSEL

J. Toney, Toney & Trivellini, Woodland, California; Malcolm Segal and James R. Kirby, II, Segal & Kirby, Sacramento, California, for the defendants-appellants.

David F. Levi, United States Attorney, and George L. O'Connell, Assistant United States Attorney, Sacramento, California, for the plaintiff-appellee.

OPINION

ALARCON, Circuit Judge:

Frank D. Monaco and Daniel Monaco, Jr. have appealed from the judgment entered following their pleas of guilty. They do not challenge the validity of their pleas. Instead, they contend that the district court erred prejudicially in its conduct of sentencing proceedings.

In resolving one of the issues in this appeal, we must decide for the first time whether a district court has the discretion to grant or deny an evidentiary hearing whenever a defendant challenges the accuracy of a statement in a presentence report.

I.

PERTINENT FACTS

Frank Monaco founded Golden Plan of California, Inc. (Golden Plan) in 1974. Golden Plan operated as a broker of loans secured by real property. On September 1, 1981, Frank Monaco sold Golden Plan to his brother, Daniel Monaco. On January 28, 1982, Golden Plan closed its doors. In February 1982, an involuntary bankruptcy petition under Chapter 11 was filed against Golden Plan.

On March 29, 1985, a federal grand jury returned an eighty-nine count indictment against Frank Monaco and Daniel Monaco. Also named in the indictment were Samuel Monaco, Gregory Monaco, Denise Monaco, Tony Monaco, and Donald Sapronetti. The indictment alleged conspiracy to commit mail fraud, mail fraud, causing stolen securities to be transported in interstate commerce, concealment of documents, perjury before a grand jury

and causing an act to be done. The charges arose out of a scheme to defraud investors which allegedly took place from February 1977 until January 28, 1982. The defendants were accused of inducing investors to make secured loans by falsely describing a property and inflating its value. As a result of the false representations, these loans were undersecured. Thus, when Golden Plan went bankrupt, the investors lost large sums of money.

Frank Monaco was charged in the indictment with one count of conspiracy to commit mail fraud and fifty-one separate counts of mail fraud. Daniel Monaco was charged with one count of conspiracy to commit mail fraud, thirty-three counts of mail fraud, one count of making a false statement to a bank, one count of concealment of documents in contemplation of bankruptcy, and one count of perjury before the grand jury.

On July 18, 1986, Frank Monaco pleaded guilty to the conspiracy charge and one count of tax evasion. On that same day, Gregory Monaco pleaded guilty to one count of mail fraud and one count of tax evasion, Tony Monaco pleaded guilty to one count of mail fraud, and Donald Sapronetti pleaded guilty to one count of mail fraud. On August 12, 1986, Daniel Monaco pleaded guilty to one count of mail fraud and Denise Monaco pleaded guilty to one count of concealing company records from a bankruptcy court. Samuel Monaco had previously pleaded guilty to three felony charges in September 1985. All of the pleas were entered pursuant to plea agreements.

Sentencing for all defendants, except Denise Monaco, was scheduled for October 14, 1986. Denise Monaco's sentencing was scheduled for October 20, 1986. Because

of various delays, sentencing did not take place until January 1987.

In mid-October 1986, the defendants and the Government received individual presentence reports from the United States Probation Office. Frank Monaco filed a number of objections to his report with the Probation Office. After two meetings between Frank Monaco and the Probation Office, during which the objections were discussed, corrections were made to the report and it was reissued in November 1986.

On December 2, 1986, the Government filed a sentencing memorandum. The Government attached a book of exhibits to this memorandum, seeking to establish the individual responsibility of Frank Monaco and Daniel Monaco for the losses due to the conspiracy, mail fraud, and tax evasion counts.

On December 30, 1986, both Frank Monaco and Daniel Monaco filed objections in the district court to their presentence reports. At this time, both defendants asked the court to hold an evidentiary hearing regarding their objections. Frank Monaco also filed a sentencing memorandum and a response to the Government's sentencing memorandum.

On January 6, 1987, the district court sentenced Frank Monaco, Gregory Monaco, Daniel Monaco and Donald Sapronetti. Gregory Monaco was sentenced to prison for two years for tax evasion and for five years for mail fraud, the sentences to run consecutively. Donald Sapronetti was sentenced to two years in prison for mail fraud.

Daniel Monaco's request for an evidentiary hearing was denied. The district court held that the presentence report did not contain any factual inaccuracies. Daniel Monaco was sentenced to five years in prison for mail fraud.

The district court overruled Frank Monaco's objections to his presentence report. The request for an evidentiary hearing was denied. The court held that there were no factual inaccuracies in the report. Frank Monaco was sentenced to consecutive five-year prison terms for tax evasion and for conspiracy to commit mail fraud. He was also fined $10,000 on each count.

Samuel Monaco was sentenced on February 25, 1986 to a total of ten years in prison. Denise Monaco was sentenced on January 12, 1987 to five years probation and 500 hours community service. On January 12, 1987, Tony Monaco was sentenced to five years probation and ordered to pay $43,927 in restitution.

II.

QUESTIONS ON APPEAL

In this consolidated appeal, Frank Monaco and Daniel Monaco, Jr., present the following questions:

(1) Whether the trial judge abused his discretion when he refused to recuse himself from imposing sentence on Frank Monaco.

(2) Whether the district court abused its discretion when it refused to grant Frank Monaco's request for an evidentiary hearing so that he could examine witnesses and rebut the alleged inaccuracies in his presentence report.

(3) Whether the district court imposed a mechanical sentence on all the defendants in this action, without considering individual characteristics or culpability.

(4) Whether the district court abused its discretion when it denied Daniel Monaco's request for an evidentiary hearing on the issue of whether the federal prison system had the necessary facilities to treat his medical problems adequately.

III.

FRANK MONACO'S APPEAL

A. *Recusal*

In his motion to correct his presentence report, Frank Monaco suggested that the trial judge should consider recusing himself because he had reviewed an overwhelming amount of "prejudicial and conclusory material provided by the government. . . ." In making the suggestion, Frank Monaco stated that the request was "not in the belief that the court has any preexisting animosity to the defendant or prejudice against him." The trial judge refused to recuse himself.

Before this court, Frank Monaco argues that the refusal of the trial judge to recuse himself was reversible error because he had reviewed material in sentencing four codefendants on the same day. Frank Monaco also asserts that the record shows that trial judge's bias against him surfaced during the sentencing of one of his codefendants and during his own sentencing. We disagree.

We have held that "[w]e will reverse a district court's denial of a motion for recusal only if the decision was an abuse of discretion." *United States v. Branco*, 978 F.2d 1302, 1304 (9th Cir. 1986).

28 U.S.C. § 455(a) (1982) states that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." "The alleged prejudice must result from an extrajudicial source. . . ." *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986). "Parties cannot attack a judge's impartiality on the basis of information and beliefs acquired while acting in his or her judicial capacity." *United States v. Frias-Ramirez*, 670 F.2d 849, 853 n.6 (9th Cir.), *cert. denied*, 459 U.S. 842 (1982). "An exception to that rule is made when a judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party." *Hamm v. members of Bd. of Regents of State of Florida*, 708 F.2d 647, 651 (11th Cir. 1983).

[1] We have reviewed the record and the transcripts of the sentencing hearings in this case. The trial judge did not abuse his discretion in refusing to recuse himself. The trial judge's statement concerning Frank Monaco did not emanate from an extrajudicial source. The judge's comments are supported by the evidence presented during the course of Frank Monaco's sentencing proceedings.

Furthermore, the comments made by the judge do not demonstrate pervasive bias or prejudice. These statements simply reflect that the judge was appropriately outraged at the enormity of the crime that had taken place and upset with the fact that the parties were not taking responsibility for their crimes.

[2] We have held previously that knowledge obtained from judicial proceedings involving a codefendant does not require recusal. *See United States v. Winston*, 613 F.2d

221, 223 (9th Cir. 1980) (knowledge obtained during a pretrial competency hearing for a codefendant did not require recusal); *United States v. Azhocar*, 581 F.2d 735, 740 (9th Cir. 1978) (remarks based on information contained in a report brought to the judge's attention during the bail hearing of a codefendant did not require recusal), *cert. denied*, 440 U.S. 907 (1979). Thus, the fact that the trial judge may have been exposed to materials concerning the nature and extent of Frank Monaco's criminal activities in reviewing his codefendant's presentence reports did not compel recusal in this matter.

B. *Inaccuracies in the Presentencing Report*

Frank Monaco contends that he "raised a substantial issue that materially false and/or untrue information was contained in the presentence report . . . " and that the district court should have either granted him an evidentiary hearing or given him the opportunity to depose the persons the probation officer referred to in making his report.

Consideration of claims of inaccuracies in a presentence report is governed by Fed. R. Crim. P. 32(c)(3)(D). Rule 32(c)(3)(D) provides in pertinent part as follows:

> If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part therof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

"Strict compliance with this Rule is required, and 'failure to comply will result in remand.' " *United States v. Sharon*, 812 F.2d 1233, 1234 (9th Cir. 1987) (quoting *United States v. Edwards*, 800 F.2d 878, 881 (9th Cir. 1986)).

It is clear from the record that the court complied with these requirements. The court, after reading the material before it and hearing oral argument from both sides, found that there was a sufficient basis for belief in the accuracy of the statements in the presentence report.

The question remains whether the district court should have held an evidentiary hearing to allow Frank Monaco to examine witnesses who provided information he asserts was inaccurate. We have not previously resolved the question whether an evidentiary hearing is required whenever a defendant asserts that the presentence report contains inaccurate statements.

In *United States v. Petitto*, 767 F.2d 607, 611 (9th Cir. 1985), we suggested that the issue whether an evidentiary hearing is necessary to allow adequate rebuttal to allegedly inaccurate statements in a presentence report is left to the discretion of the district court. In *Petitto*, we were called upon to determine whether the district court had complied with Fed. R. Crim. P. 32(c)(3)(A) in conducting the sentencing proceedings. Rule 32(c)(3)(A) provides in pertinent part:

> At a reasonable time before imposing sentence the court shall permit the defendant and the defendant's counsel to read the report of the presentence investigation. . . .The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the *discretion of the court*, to

> introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(Emphasis added). In *Petitto*, we commented that

> [d]ue process does not require an evidentiary hearing . . . on all challenged information in the presentence report. At the court's discretion[,] this opportunity to rebut could be granted by allowing defendant and his counsel to comment on the report or to submit affidavits or other documents, or by holding an evidentiary hearing.

767 F.2d at 611 (citations omitted). Our observations in *Petitto* were dictum, however, because the court concluded that the district court had failed to comply with the finding requirements of Rule 32(c)(3)(D). *Id.* in *Petitto*, we remanded the matter to the trial court with directions that it comply with Rule 32(c)(3)(D) and make the initial determination whether an evidentiary hearing was necessary. *Id.*

The Tenth Circuit has also stated in *dictum* "that the decision of whether to hold an evidentiary hearing is within the discretion of the trial court." *United States v. Peterman*, 841 F.2d 1474, 1484 (10th Cir. 1988). In *Peterman*, we commented that while the defendant "must be given an opportunity to explain why he believes the presentence report was incorrect, the scope of the procedure for rebuttal lies within the sound discretion of the trial judge in 'balancing the need for reliability with the need to permit consideration of all pertinent information.' " *Id.* (quoting *United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983), in turn quoting *Orner v. United States*, 578 F.2d 1276, 1279 (8th Cir. 1978)). The Tenth Circuit did not decide whether the trial court abused its discretion in denying an evidentiary hearing because it was required

to remand the case for resentencing due to a failure to comply with Rule 32(c)(3)(D) and to determine in the first instance whether an evidentiary hearing was necessary. *Id.*

[3] We agree with the interpretation of Rule 32(c)(3)(A) contained in *Petitto* and *Peterman*. Rule 32(c)(A)(3) expressly provides that the decision whether testimony may be introduced to rebut any factual allegation is "in the discretion of the court." Accordingly, we hold that a district court's decision to deny a request for an evidentiary hearing on alleged inaccuracies in a presentence report must be reviewed for abuse of discretion.

A district court may "consider a wide range of information in arriving at the sentencing decision[,]" *United States v. Givens*, 767 F.2d 574, 585 (9th Cir.), *cert. denied*, 474 U.S. 953 (1985), including dropped counts in an indictment. *United States v. Romano*, 825 F.2d 725, 728 (2d Cir. 1987). In order to challenge successfully information in a presentence report, the information must lack " 'some minimal indicium of reliability beyond mere allegation.' " *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984) (quoting *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982), construing *United States v. Weston*, 448 F.2d 626, 633-34 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972)).

In ruling on Frank Monaco's Rule 32(c)(3)(D) motion, the district court had before it (1) the probation officer's presentencing report, (2) the Government's sentencing memorandum and exhibits, (3) Frank Monaco's sentencing memorandum, (4) Frank Monaco's response to the Government's sentencing memorandum, and (5) Frank

Monaco's motion to correct the presentence report. On appeal, Frank Monaco raises three general categories of inaccuracies in the presentence report that he claims he did not have an adequate opportunity to rebut.

1. Loss Attributable to Frank Monaco

First, Frank Monaco contends that he was unable to respond to the amount of loss attributed to him in the presentence report. He claims that "he should have been given an opportunity to examine the sources the probation officer relied upon to make sweeping statements concerning his connection with the theft of millions of dollars." The probation officer received these figures from the Government. *See* Presentence Report for Frank Monaco 4-14. The Government presented the same information in its sentencing memorandum filed on December 2, 1986. Each of the Government's statements in the sentencing memorandum was supported by a declaration and an exhibit. Frank Monaco received this information prior to filing his own sentencing memorandum. In addition, he filed a response to the Government's memorandum. He did not, however, take advantage of the opportunity to question the bankruptcy trustee prior to filing his motions to correct the alleged inaccuracies in the presentence report. He stated during his argument on the motion to correct the report that the trustee did not respond to his phone calls. The record shows, however, that he failed to ask the court for an order requiring the trustee to respond to his questions.

Frank Monaco also had access to all of the materials collected by the Government for trial. Following the indictment, Frank Monaco and the Government engaged

in extensive investigations and discovery. The Government made all Rule 16 discovery materials available to each defendant. In addition, the Government provided each defendant with its list of trial witnesses and exhibits.

Finally, the record shows that Frank Monaco owned the Golden Plan. If the Government's financial information was inaccurate, he had the opportunity to present correct facts to the court from the company's records.

[4] In light of the evidence presented by the Government, and Frank Monaco's failure to present any facts in rebuttal, the district court did not abuse its discretion in concluding that an evidentiary hearing or an order compelling the taking of a deposition of the trustee was not required.

2. Victim Impact Letters

Frank Monaco also claims that the presentence report is inaccurate because it refers to victim impact letters which he claims had no connection to his conduct.

Frank Monaco was not given the opportunity to review the victim impact letters referred to in the presentence report until the day of the sentencing hearing. Frank Monaco had unsuccessfully requested that the probation officer permit him to see the victim impact letters. He did not seek an order from the court that he be given an opportunity to see them prior to the hearing. At the hearing, the district court ordered a twenty-minute delay in the proceedings to permit Frank Monaco's attorney to read the forty-five victim impact letters.

The victim impact letters were solicited prior to defendant Samuel Monaco's sentencing on February 25, 1986. According to Frank Monaco, the letters do not

> specifically identify themselves with this case, that is to say, with the count to which Frank Monaco has pled guilty. They talk in general terms and I believe that it's impossible, looking at the letters, to take those letters and say that those letters relate to the crime to which the defendant pled guilty.

Frank Monaco argues that, because the letters refer to the indictment in general and not to the specific charge to which he pled guilty, all references to them should have been stricken from the presentence report.

The majority of the victim impact letters do not refer specifically to Frank Monaco, to any other defendant by name, or to any specific allegation in the indictment. The letters instead complain only in general terms of the losses the victims suffered as a result of their relationship with Golden Plan.

[5] Because Frank Monaco pled guilty to the conspiracy count of the indictment, the fact that he or his criminal activities is not described in the letters does not bar their consideration by the court in making its sentencing decision. His participation in the conspiracy to defraud contributed to the victims losses. Accordingly, the court did not err in considering the victim impact letters. *See* Fed. R. Crim. P. 32(c)(2)(C) (presentence report should contain section cataloging harm or loss suffered by any victim of the offense).

3. Tax Liability

Frank Monaco contends that the estimated tax liability in the presentence report was inaccurate and misleading because (1) his "plea bargain provides taxes due will be calculated and resolved by the civil division of the Internal Revenue Service in a separate proceeding" and (2) the "estimate does not include offsets for losses suffered" by him. Frank Monaco also alleges that he "has not been given access to the information used to calculate his tax liability." In his reply brief, Frank Monaco states that the IRS has never calculated an amount due and that he believes that there is no tax due. Finally, he argues that he should be given the opportunity to cross-examine the accountant who prepared the allegedly fraudulent tax return so that he could expose the reasons that the inaccurate tax claim was submitted.

The Government presented to the court in its sentencing memorandum the IRS' calculation of Frank Monaco's estimated tax liability. Frank Monaco did not submit any evidence to contradict these figures. In addition, the plea agreement provides that the "criminal plea does not compromise in any way the civil tax liabilities or penalties that might be sought against Frank Monaco by the government." The plea agreement did not preclude the Government from presenting an estimate of Frank Monaco's tax liability to the district court for consideration in reaching its sentencing decision.

The district court did not abuse its discretion in refusing to continue the sentencing proceedings to allow Frank Monaco to present evidence concerning his tax liability. Frank Monaco had the opportunity to present

evidence prior to the date of the sentencing hearing to support his allegations that he owed no taxes but failed to do so.

[6] It should also be noted that the accountant who prepared the Golden Plan's financial records was employed by Frank Monaco when the tax returns were executed. Frank Monaco failed to explain to the district court the reason that the accountant was not available for questioning about any tax liability prior to the sentencing hearing. The district court did not abuse its discretion in denying Frank Monaco the opportunity to continue the proceedings so that he could present the accountant as a witness.

C. *Mechanically Imposed Sentence*

[7] Frank Monaco contends that the district court sentenced the codefendants as a group and refused to consider individual culpability or the nature and extent of the harm caused by each individual defendant.

When a sentence "is within the statutory limits, it will be reviewed only for an abuse of discretion." *United States v. Benny*, 786 F.2d 1410, 1421 (9th Cir.), *cert. denied*, 107 S. Ct. 668 (1986). The failure to individualize a sentence, however, compels reversal or resentencing of the defendant. *United States v. Barker*, 771 F.2d 1362, 1365 (9th Cir. 1985). "In each case, a criminal sentence must reflect an individualized assessment of a particular defendant's culpability rather than a mechanistic application of a given sentence to a given category of crime." *Id.* We must look at the record to see if it indicates "that the district

court actually and adequately considered the factors necessary to insure that each individual defendant was assessed and sentenced as an individual[.]" *Id.* at 1365-66.

[8] Frank Monaco's claim that the district court engaged in mechanical sentencing is readily refuted by examining the sentence received by each defendant. *Cf. United States v. Allen*, 675 F.2d 1373, 1385-86 (9th Cir. 1980) (mechanical sentencing claim answered by pointing out varied sentences for codefendants), *cert. denied*, 454 U.S. 833 (1981). The sentences imposed by the court were not uniform. Some defendants received the maximum sentence. Others received less than the maximum possible punishment. For example, Gregory Monaco received a sentence of seven years, three years less than the maximum, and one year less than that recommended in the presentence report. Clearly, if the district court engaged in mechanical sentencing, each defendant would have received the maximum sentences.

In addition, the district court, in sentencing Frank Monaco, stated:

> In accepting the plea bargain or agreement and thus limiting the Court to a maximum of ten years, I am already crediting all the mitigating factors which the defense now argues including the defendant's lack of prior conviction history, the fact that it is difficult to assess individual responsibility among several of the co-defendants who today cast an accusing finger at each other and the fact, as the Probation Office recognizes, that the total loss in millions occasioned by the collapse of the Golden Plan Company may be partially attributable to mismanagement and a collapse in the real estate market as well as the criminal conduct of each of the principal defendants, namely Frank, Samuel, Gregory and Daniel Monaco.

This statement by the district court demonstrates the court pronounced individualized sentences. The court's explanation of the basis for its sentence, and the variation in the punishment set out by the court, distinguishes this matter from the cases relied on by Frank Monaco. *See Barker*, 771 F.2d at 1366-67 (court engaged in mechanical sentencing when it imposed same maximum sentence on all five defendants even though there was evidence of different levels of involvement and the government asked for much lighter terms); *United States v. Lopez-Gonzales*, 688 F.2d 1275, 1277 (9th Cir. 1982) (remanded for resentencing because "judge stated that he automatically imposes the maximum sentence whenever an illegal alien is apprehended after flight and pursuit . . . "). Accordingly, we conclude that the court did not engage in mechanical sentencing in this action.

IV.

DANIEL MONACO'S APPEAL

Daniel Monaco argues that the district court erred when it refused to grant him a hearing "to determine whether incarceration would constitute cruel and unusual punishment."

[9] Daniel Monaco has multiple sclerosis. He argues before this court that because no specific details concerning his "condition or needed treatment were given the prison official, nor was any current physical examination performed . . . the Court had a clear duty to at least allow a hearing under [Fed. R. Crim. P.] 32(c)(3)(D) to determine [his] present condition, needed treatment and availability of prison facilities, to treat him."

The presentence report concluded that there were facilities available for an inmate in Daniel Monaco's physical condition. Daniel Monaco filed an objection to this finding with the Probation Office and requested a physical examination to determine if he should be sentenced to prison. In his sentencing memorandum of December 30, 1986, Daniel Monaco again objected to the presentence report's finding and requested that the court order further proceedings to determine his current physical condition.

During the sentencing hearing, Daniel Monaco told the court that he needed intensive rehabilitation to regain the use of his legs and that such care was not available within any prison facility. The Government stated that the Bureau of Prisons had informed the probation officer that their hospitals could handle "someone with an advanced or severe case of multiple sclerosis."

The court denied the request for further proceedings and found that there was a sufficient factual basis for the statement in the presentence report that Daniel Monaco could receive adequate medical treatment in a prison facility. The court then sentenced Daniel Monaco to five years imprisonment. The sentence was expressly imposed by the court pursuant to 18 U.S.C. § 4205(b)(2) (1982) so that Daniel Monaco would be "immediately eligible for release on parole in the discretion of the United States Bureau of Prisons and even to a Veteran's Administration Hospital if they deem it advisable. . . ."

[10] The district court did not abuse its discretion in denying Daniel Monaco's request for an evidentiary hearing. The court had before it the statements of the

probation officer and the Government attorney that they had been informed that the Bureau of Prisons had facilities to provide medical care for a prisoner with advanced or severe multiple sclerosis.

[11] In addition, Daniel Monaco stated during argument on his objection that he had confirmed "that the prison system says it can take somebody in an advanced case of deterioration from this disease. . . ." His only objection was that he would not be able to get a certain type of treatment while in prison. Although he had claimed since mid-November that, contrary to the presentence report, the Bureau of Prisons could not provide adequate medical facilities for someone in his condition, he failed to present any evidence during the sentencing hearing to support his assertion that the type of treatment he sought was not available in the prison system.

In concluding that the district court did not abuse its discretion we are mindful that the district court sentenced Daniel Monaco pursuant to 18 U.S.C. § 4205(b)(2), to permit the parole board to release him immediately if it was determined that the Bureau of Prisons could not provide adequate care. The district court did not abuse its discretion in denying Daniel Monaco's for an evidentiary hearing to challenge the accuracy of the presentence report that the Bureau of Prisons can provide adequate care for a prisoner suffering from multiple sclerosis.

The sentences imposed against Frank Monaco and Daniel Monaco are AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. FRANK D. MONACO, *Defendant-Appellant.*	No. 87-1011 D.C. No. CR.S-85-82EJG ORDER (Filed September 22, 1988)
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. DANIEL MONACO, JR., *Defendant-Appellant.*	No. 87-1013 D.C. No. CR.S-85-82EJG

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted June 13, 1988
San Francisco, California
Filed July 26, 1988

Before: ALDISERT,* ALARCON and HALL, Circuit Judges.

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*Honorable Ruggero J. Aldisert, Sr. Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

The panel as constituted in case No. 87-1011 has voted to deny the petition for rehearing. Judges Alarcon and Hall have voted to reject the suggestion for a rehearing en banc. Judge Aldisert would so recommend.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The petition for rehearing in case No. 87-1013 is denied.

Supreme Court, U.S.
FILED
DEC 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-567

In the Supreme Court of the United States

OCTOBER TERM, 1988

FRANK D. MONACO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1488

QUESTION PRESENTED

Whether petitioner was entitled to an evidentiary hearing at sentencing in order to challenge alleged inaccuracies in his presentence report.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. í-22) is reported at 852 F.2d 1143.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1988. A petition for rehearing was denied on September 22, 1988. The petition for a writ of certiorari was filed on September 30, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On March 29, 1985, an 89-count indictment was returned against petitioner and six co-defendants in the United States District Court for the Eastern District of California. Petitioner was charged with one count of conspiracy to commit mail fraud, in violation of 18 U.S.C.

371, and 51 counts of mail fraud, in violation of 18 U.S.C. 1341. Pursuant to a plea agreement, petitioner pleaded guilty to the conspiracy charge and to one count of an information charging him with attempted income tax evasion, in violation of 26 U.S.C. 7201. He was sentenced to consecutive terms of five years' imprisonment on the two counts, and he was fined $20,000. The court of appeals affirmed (Pet. App. 1-22).

1. The factual background of this case is summarized in the government's brief in the court of appeals and in the government's sentencing memorandum. In 1974, petitioner founded Golden Plan of California, Inc., a large mortgage broker that operated throughout California. Through August 1981, petitioner was the president, chief executive officer, and sole owner of Golden Plan and of a number of related corporations. He employed a number of family members at the company and placed three of his brothers, who later became his co-defendants, in high management positions. On September 1, 1981, petitioner sold Golden Plan to one of his brothers, co-defendant Daniel Monaco. On January 28, 1982, Golden Plan closed its doors and ceased doing business. The following month, an involuntary bankruptcy petition was filed against Golden Plan.

Before becoming insolvent, Golden Plan, acting as broker, arranged for individual investors to make loans that were secured by mortgages on real property. The company contacted potential lenders by mailing prospectuses and other written materials describing available properties. Lenders typically invested in second and third deeds of trust secured by the properties described in the prospectuses.

During most of the period the company was in existence, petitioner exercised day-to-day management responsibilities over its operations. In particular, petitioner

handled the preparation of the prospectuses that were mailed to investors. To induce lenders to make loans through Golden Plan, petitioner routinely caused employees to inflate the value and to misrepresent the condition of the properties described in the prospectuses. By providing false and misleading information, petitioner was able to increase the number of Golden Plan's loan closings and the amount of its commission income.

Although most of the transactions handled by Golden Plan involved outside borrowers, petitioner and his family members also arranged insider loans to themselves and to corporations they controlled. On several occasions, petitioner and his family members purchased property and then borrowed money through loans brokered by Golden Plan. Those loans were obtained on the basis of false prospectuses that grossly overvalued the property that petitioner and his relatives had purchased. In addition, petitioner caused Golden Plan to issue false prospectuses for loans secured by properties owned by a subsidiary corporation known as Mid-Central, which acted as Golden Plan's property manager. Those properties were generally ones on which Golden Plan had foreclosed after a borrower's default, and they were often in a state of dramatic disrepair. Through Golden Plan, petitioner arranged new loans for those properties by issuing prospectuses that inflated their value and misdescribed their condition.

The monthly interest payments on many of the loans arranged by Golden Plan were paid out of Golden Plan's escrow trust account, which was supposed to hold investors' funds in trust until their loans closed. In addition, petitioner siphoned off hundreds of thousands of dollars from the account through one of his corporations, Roscoe Technology, which purportedly provided funds for loans. By September 1981, there was a shortage of almost $3 million in the company's escrow trust account.

After petitioner sold Golden Plan in September 1981, his three brothers apparently continued to issue false prospectuses for loans, and they also embezzled additional sums from the escrow trust account. By January 1982, Golden Plan was insolvent. When Golden Plan was forced into bankruptcy, investors lost more than $3 million because of the low value of the properties that secured the loans and because of the depletion of the escrow trust account.

During the period covered by the indictment, petitioner also attempted to evade the payment of income taxes and filed false income tax returns. He failed to report more than $1 million in income on his 1981 tax return, and he filed false tax returns for several of his personally controlled corporations. Based on the substantial increase in petitioner's personal wealth between 1974 and 1982, it further appeared that petitioner had consistently underreported his income for almost a decade.

2. Petitioner entered his guilty plea on July 18, 1986. Sentencing was initially scheduled for October 14, 1986, but it was subsequently delayed until January 6, 1987. Pet. App. 5-6. In mid-October 1986, the probation office delivered copies of the presentence report to petitioner and the government. Petitioner filed a number of objections to the report with the probation office. After two meetings with petitioner concerning the objections, the probation office issued a corrected presentence report in November. *Id.* at 6.

On December 2, 1986, the government filed its sentencing memorandum, which was accompanied by a book of exhibits designed to establish petitioner's individual responsibility for some of the losses that resulted from Golden Plan's operations. Pet. App. 6. Included among those exhibits was the sworn declaration of the postal inspector who determined, based on information about the

loans supplied by the bankruptcy trustee, that petitioner had a direct role in causing losses to investors of more than $1 million. Gov't C.A. E.R. 13-15. That calculation of the losses attributable to petitioner was included in the presentence report.

On December 30, 1986, one week before the scheduled sentencing, petitioner filed his objections to the presentence report, a response to the government's sentencing memorandum, and his own sentencing memorandum. At that time, petitioner asked, for the first time, for an evidentiary hearing. Among other things, petitioner requested an opportunity either to depose the bankruptcy trustee or to cross-examine him at an evidentiary hearing about the calculation of the $1 million in losses attributed to petitioner. Pet. App. 6.

At the sentencing on January 6, 1987, the district court overruled most of petitioner's objections to the presentence report. The court found that the objections, for the most part, did not challenge the accuracy of the statements of fact included in the presentence report but instead merely offered a different interpretation of those facts. Tr. 11. The court also denied petitioner's request to depose the bankruptcy trustee or to cross-examine him at an evidentiary hearing concerning the amount of the losses that petitioner caused investors to incur. The court ruled that petitioner had not shown that such an examination was necessary. Tr. 7-8, 31, 33-34.

2. The court of appeals affirmed (Pet. App. 1-22). In particular, the court rejected petitioner's claim that he was entitled to an evidentiary hearing or an opportunity to depose the bankruptcy trustee. The court noted (*id.* at 11) that the district court had found "that there was a sufficient basis for belief in the accuracy of the statements in the presentence report." That finding, the court held, satisfied the requirement of Fed. R. Crim. P. 32(c)(3)(D)

that specific findings be made regarding contested statements in a presentence report. The court of appeals then noted (Pet. App. 11) that it had "not previously resolved the question whether an evidentiary hearing is required whenever a defendant asserts that the presentence report contains inaccurate statements." The court pointed out, however, that Fed. R. Crim. P. 32(c)(3)(A) expressly provides that " '[t]he [district] court shall afford the defendant and the defendant's counsel an opportunity to comment on the [presentence] report and, in the *discretion of the court*, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it' " (Pet. App. 11-12 (emphasis in opinion)). The court of appeals accordingly held (*id.* at 13) that "a district court's decision to deny a request for an evidentiary hearing on alleged inaccuracies in a presentence report must be reviewed for abuse of discretion."

The court of appeals went on to reject petitioner's particular claims that he had been denied an adequate opportunity to rebut certain allegedly inaccurate statements in the presentence report (Pet. App. 14-18). Specifically, the court rejected the claim petitioner renews in this Court—that he was unable, without examining the bankruptcy trustee, to contest the presentence report's assertions that his criminal conduct caused losses of more than $1 million (*id.* at 14-15). The court observed (*id.* at 14) that the probation officer received the loss figure from the government, which had presented the same information in its sentencing memorandum, and that "[e]ach of the Government's statements in the sentencing memorandum was supported by a declaration and an exhibit." The court pointed out (*ibid.*) that petitioner had received that information prior to filing his own sentencing memorandum, but that he had not "take[n] advantage of the opportunity to question the bankruptcy trustee prior to filing

his motions to correct the alleged inaccuracies in the presentence report" and that he had "failed to ask the court for an order requiring the trustee to respond to his questions" when the trustee allegedly did not return his counsel's telephone calls. The court also observed (*id.* at 14-15) that petitioner "had access to all of the materials collected by the Government for trial" as a result of extensive pretrial discovery. Finally, the court noted (*id.* at 15) that petitioner, as the former owner of Golden Plan, was in a position to provide facts about the loans from the company's records if he believed the government's financial information was inaccurate. The court accordingly held (*ibid.*) that the district court did not abuse its discretion by denying an evidentiary hearing "[i]n light of the evidence presented by the Government, and [petitioner's] failure to present any facts in rebuttal."

ARGUMENT

1. Petitioner first contends (Pet. 8-13) that he was denied due process by the district court's refusal to hold an evidentiary hearing or to allow him to depose the bankruptcy trustee concerning the losses attributed to petitioner in the presentence report. That factbound contention was correctly rejected by the court of appeals. As the district court found (Tr. 7-8, 31, 33-34), petitioner made no showing of a need for a court-ordered examination of the trustee; and as the court of appeals concluded, petitioner had an ample opportunity to make such a showing if it could be made.

The only information regarding the alleged losses that the bankruptcy trustee supplied to the government was the amounts of the various loans and the amounts of the actual recoveries on the properties securing each loan (or, in a few cases, the expected recoveries based on offers to

buy). Contrary to petitioner's suggestion (*e.g.*, Pet. 11, 13), there is no mystery about the basis for the loss calculations: the government's exhibits to its sentencing memorandum (Gov't C.A. E.R. 13-14) expressly show that the loss for each loan was simply the difference between the amount of the loan and the amount recovered. Petitioner never put forth any contrary figures or any basis whatever for doubting the accuracy of the trustee's loan and recovery figures; indeed, at least in this Court and in the court of appeals, petitioner has not even alleged that those figures were inaccurate. Moreover, the accuracy of those figures could be challenged by simple documentation. If challenged, the accuracy of the figures would raise an issue of the sort that even petitioner concedes would not necessarily require an evidentiary hearing (Pet. 10).

To the extent that petitioner, in referring to the trustee's "estimates" (Pet. 6, 13), suggests that correct appraisals of the properties were essential to calculating the true amount of the loss, that challenge affords no support for his request for a hearing to examine the trustee. There was no need for an examination of the trustee on that issue, because no such appraisals were included in the government's sentencing memorandum. Moreover, petitioner presented no evidence of his own on the issue, such as his own appraisals of the properties.[1]

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[1] Contrary to petitioner's suggestion (Pet. 12), the decision in the bankruptcy proceedings in *In re Golden Plan, Inc.*, 829 F.2d 705 (9th Cir. 1987), did not establish that the loss calculations were inaccurate. That decision involved technical issues of bankruptcy and securities law regarding, among other things, the nature of the transaction between Golden Plan and certain lenders. The decision has no bearing on the loss calcuations in the presentence report or in the government's sentencing exhibits.

Petitioner's claim that he needed to examine the trustee is even weaker with respect to the attribution of Golden Plan's losses than it is with respect to the amount of the losses. As the court of appeals pointed out (Pet. App. 14), and as the government stated at sentencing (Tr. 29), the attribution of the losses to petitioner, rather than to someone else, was made by the government, not the bankruptcy trustee. The trustee's testimony on that issue was therefore unnecessary. In any event, petitioner did not put forth evidence refuting his involvement with particular prospectuses or properties.

On both loss-related issues, therefore, petitioner failed to make even a minimal showing of need to examine the trustee in order to contest the accuracy of the information in the presentence report and in the government's sentencing memorandum and supporting exhibits. Moreover, petitioner had ample opportunity to develop the necessary information. He had full access to the government's trial preparation materials; he had been the owner and chief executive of Golden Plan at the time of the loans at issue; and he had several months to question the trustee, by his own efforts or through the aid of a court order, before he finally asked for a hearing or deposition one week prior to sentencing. In these circumstances, the district court's denial of petitioner's last-minute request to examine the trustee, when there was no basis for believing that such an examination might undermine the government's allegations of loss attributable to petitioner, did not deprive petitioner of a full and fair opportunity to challenge the sentencing information and therefore did not violate petitioner's due process rights.[2]

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[2] Nothing in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), suggests a contrary conclusion. Not even petitioner contends that a hearing must be held or compulsory process issued where, as here, there has been

2. Petitioner also contends (Pet. 14-16) that the decision of the court of appeals conflicts with *United States* v. *Romano*, 825 F.2d 725 (2d Cir. 1987). To the contrary, the Second Circuit's decision in *Romano* is fully consistent with the analysis employed by the court of appeals here. Indeed, the Second Circuit plainly stated in *Romano* that "[a] district judge, *in his discretion*, may direct that a trial-type evidentiary hearing take place" when a defendant challenges the accuracy of information in a presentence report (825 F.2d at 729 (emphasis in original)). See also *United States* v. *Pugliese*, 805 F.2d 1117, 1123 (2d Cir. 1986) ("Sentencing hearings ultimately are conducted within the discretion of the district court"). To be sure, the court in *Romano* indicated that the due process analysis of *Mathews* v. *Eldridge*, 424 U.S 319 (1976), should be applied to determine whether the district court abused its discretion in a particular case. But that analysis does not conflict with the court of appeals' analysis in the present case. See note 2, *supra*. Indeed, the court in *Romano* concluded that, when a defendant is "on notice of all relevant information that could be used in determining his sentence and ha[s] an opportunity to make appropriate objections[,] [n]o more is required by the Due Process Clause

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no showing of need, or of likely receipt of material information, let alone where there has been a fair opportunity to secure such information. *Mathews* does not require the pointless addition of procedures. Moreover, the governmental interest in avoiding needless formalization and complication of sentencing procedures is well recognized. See, *e.g.*, Fed. R. Crim. P. 32(c)(3)(A) (discretionary standard for hearing); *United States* v. *Branco*, 798 F.2d 1302, 1306 (9th Cir. 1986); *United States* v. *Satterfield*, 743 F.2d 827, 840 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985). This case turns not on any general issue regarding sentencing procedures, but on petitioner's failure to meet the threshold showing of need for the additional requested procedure.

or by Rule 32" (825 F.2d at 730). Accordingly, in the circumstances of this case, where there was no basis for demanding an examination of the trustee and petitioner had access to the information required to challenge the presentence report, the Second Circuit would have reached the same result and would have applied essentially the same analysis as the court below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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